FILE COPY

Office - Supreme Court, U. S.
FILED
APR 20 1938
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1937—NOS. 773-775.

AETNA INSURANCE COMPANY,
Petitioner,
against
UNITED FRUIT COMPANY,
Respondent.

UNION MARINE & GENERAL INSURANCE COMPANY, LTD.,
Formerly Union Marine Insurance Company, Ltd.,
Petitioner,
against
UNITED FRUIT COMPANY,
Respondent.

BOSTON INSURANCE COMPANY,
Petitioner,
against
UNITED FRUIT COMPANY,
Respondent.

BRIEF FOR RESPONDENT.

CLETUS KEATING,
RICHARD SULLIVAN,
Counsel for Respondent.

Pandick Press, Inc., 22 Thames St., New York, U. S. A.

INDEX.

	PAGE
STATEMENT	1
OPINIONS BELOW	2
PROCEEDINGS BELOW	2
FACTS	4
THE POLICIES OF INSURANCE	12
THE DECISION OF THE DISTRICT COURT	15
THE HOLDING OF THE CIRCUIT COURT OF APPEALS	16
FIRST POINT—The recovery from the wrongdoer was distributed on principles of subrogation in accordance with equity and justice	17
SECOND POINT—The equitable principles of subrogation are not changed by the agreed valuation in the policies	24
THIRD POINT—The decisions relied on by petitioners have been expressly repudiated in this Country, criticized in England, and are based on principles recently disapproved by this Court	28
FOURTH POINT—*The Livingstone*, the only marine case in point, was followed in this case	34
FIFTH POINT—The erroneous ruling of *The Armstrong* relied on by the petitioners was condemned by this Court in *Gulf Refining Co.* v. *Ins. Co.*, 279 U. S. 708. In that decision this Court reflected on the soundness of certain District Court opinions relied on by the petitioners	42
LAST POINT—Petitioners' assertions of conflict with English law and established underwriting practices are baseless	48

Index of Cases.

	PAGE
Aetna Casualty Co. v. *Phoenix Co.*, 285 U. S. 209, 214	19
Alsop v. *Commercial Ins. Co.*, Fed. Cas. No. 262	51
Assicurazioni v. *Empress Assur. Corp.*, [1907] 2 K. B. 814, 821	24
S.S. Balmoral v. *Marten*, [1902] App. Cas. 511, 514	29, 43
The Battler, (E. D. P. A.) 67 Fed. 251, 253	36
Boag v. *Standard Marine Ins. Co.*, (C. A.) 57 Ll. L. 83	23
Boston Sand Co. v. *United States*, 278 U. S. 41, 47	9
Bousfield v. *Barnes*, 4 Camp. 228	27
Bradlie v. *The Maryland Insurance Co.*, 12 Pet. 378, 399	32, 43
British & Foreign Marine Ins. Co. v. *Maldonado & Co.*, (C. C. A. 9) 182 Fed. 744; cert. den. 220 U. S. 622	32
Brown v. *Merchants' Marine Ins. Co.*, (C. C. A. 9) 152 Fed. 411	41, 50, 51
Burnand v. *Rodocanachi*, [1882] L. R. 7 App. Cas. 333, 342	29, 31
Chapman v. *Hoage*, 296 U. S. 526	18
Coleman v. *United States*, 152 U. S. 96	36
Columbia T. Co. v. *Norske Lloyd Ins. Co., Ltd.*, 100 Misc. 550; affirmed 229 N. Y. 556	28
The Commonwealth [1907], P. 216	22, 24
The Dixon King (*Great Lakes Transit Corp.* v. *Interstate Steamship Co.*), 301 U. S. 646	20
Duus Brown & Co. v. *Binning*, [1906] 11 Com. Cas. 190, 194	24

PAGE

Edwards & Co. v. *Motor Union Insurance Co.*, [1922] 2 K. B. 249 11

Empire Dev. Co. v. *Title G. & T. Co.*, 225 N. Y. 53, 58 32
Federal Ins. Co. v. *Det. F. & M. Ins. Co.*, (C. C. A. 6) 202 Fed. 648 24

Goole & Hull Steam Towing Co. v. *Ocean Marine Ins. Co.*, [1928] 1 K. B. 589, 597 29
Gulf Refining Co. v. *Ins. Co.*, 279 U. S. 708, 712, 29, 31, 42, 43, 46, 47, 48, 49
Gulf Refining Co. v. *Ins. Co.*, 27 F. (2d) 678 ..... 32, 47

Frank B. Hall & Co. v. *Jefferson Ins. Co.*, (S. D. N. Y.) 279 Fed. 892 51
Hall & Long v. *The Railroad Companies*, 13 Wall. 367 19
Hardman v. *Brett*, 37 Fed. 803 36
Hobbs v. *McLean*, (1886) 117 U. S. 567 36

Irving v. *Manning*, 6 C. B. 420, 136 E. R. 1302 ..... 27, 29, 32, 43

Jones v. *Bacon*, 145 N. Y. 446, 450; 40 N. E. 216 19

Liverpool Steam Co. v. *Phenix Ins. Co.*, 129 U. S. 397, 462 23
The Livingstone, (C. C. A. 2) 130 Fed. 746, 15, 16, 18, 20, 25, 26, 29, 32, 34, 35, 36, 37, 38, 39, 40, 42, 48
The Livingstone, 122 Fed. 278 ..... 15, 35
Luckenbach v. *McCahan Sugar Co.*, 248 U. S. 139, 146 23

Mobile & Montgomery R. Co. v. *Jurey*, 111 U. S. 584, 594 ..... 23, 42
Mutual Fire Insurance Co. v. *Budd*, 208 Mich. 483 ..... 26, 32

Newcombe v. *Cin. Ins. Co.*, 22 Ohio St. 382 36
North of England Assoc. v. *Armstrong*, L. R. 5 Q. B. 244 ..... 16, 27, 28, 29, 30, 31, 32, 33, 34, 37, 41, 42, 43, 44, 46, 48

PAGE

Norwich Union Fire Ins. Soc. v. *S. O. Co.*, (C. C. A. 8) 59 Fed. 984 ..... 22, 23

Patapsco Ins. Co. v. *Southgate*, 5 Pet. 604 ..... 32, 43
Pitman v. *Universal Marine Ins. Co.*, [1882] L. R. 9 Q. B. D. 192 ..... 29, 43
Pleasants v. *Maryland Ins. Co.*, 8 Cranch 55 28
The Potomac, 105 U. S. 630, 635 ..... 16, 22, 23, 38, 39, 40, 42

The St. Johns, 101 Fed. 469 ..... 16, 41, 43, 45, 46
St. Louis, Iron Mountain & Southern Ry. Co. v. *Commercial Union Ins. Co.*, 139 U. S. 223, 235 ..... 19, 23
St. Paul (International Navigational Co. v. *Atlantic Mutual Ins. Co.)*, 100 Fed. 304 ..... 43, 44, 45, 46, 47, 49
St. Paul Fire & Marine Insurance Co. v. *Pure Oil Co.*, (C. C. A. 2) 63 F. (2d) 771 33
Standard Marine Insurance Co. v. *Scottish Metropolitan Assurance Co., Ltd.*, 283 U. S. 284, 288, 19, 22, 23, 50
Sun Insurance Office v. *Hohenstein*, 128 Misc. 870 24

Thames & Mersey Marine Ins. Co. v. *British & Chilean S. S. Co.*, (1915) L. R. 2 K. B. 214 31

United States v. *American Tobacco Co.*, 166 U. S. 468 19

The Welsh Girl, [1906] 22 T. L. R. 475 24
Woodworth v. *Insurance Co.*, 5 Wall. 87 36

TEXTBOOKS CITED.

Eldridge, Marine Policies, 2d Ed. p. 90 ..... 27, 32
Halsbury's Laws of England, s. 973, Vol. 7 29
Harvard Law Review Vol. 29, 553, 554 27

IN THE

Supreme Court of the United States

OCTOBER TERM, 1937—Nos. 773-775.

AETNA INSURANCE COMPANY,
Petitioner,

against

UNITED FRUIT COMPANY,
Respondent.

UNION MARINE & GENERAL INSURANCE COMPANY, LTD., formerly Union Marine Insurance Company, Ltd.,
Petitioner,

against

UNITED FRUIT COMPANY,
Respondent.

BOSTON INSURANCE COMPANY,
Petitioner,

against

UNITED FRUIT COMPANY,
Respondent.

BRIEF FOR RESPONDENT.

These consolidated cases are here on Certiorari from the United States Circuit Court of Appeals for the Second Circuit. The decree of the Circuit Court of Appeals appears at page 115 of the record and modifies in part and affirms in part judgments of the Southern District of New York at common law (R. 84, 91, 97), and it directs the dismissal of the three complaints herein.

Opinions Below.

The opinion of Judge Patterson of the United States District Court for the Southern District of New York appears at page 77 of the record and is reported 18 F. Supp. 441; 1937 A. M. C. 78.

The opinion of the Circuit Court of Appeals (Judge L. Hand, writing, Judges Swan and A. N. Hand concurring) is printed at page 107 of the record and is reported 92 F. (2d) 576.

Certiorari was granted March 14, 1938 (R. 117). 302 U. S.

Proceedings Below.

These actions were consolidated in the District Court. (R. 27) The only distinction between the cases, other than the amount involved, is in respect of the subrogation receipts. This distinction will be referred to later in the Brief. The complaints (R. 6, 13, 20) present claims for additional subrogation by Hull underwriters against their assured, United Fruit Company, the owner of the *S.S. Almirante*, which was sunk through the fault of a government vessel, the *S.S. Hisko*, September 6, 1918.

The complaints set up two alternative claims: first, the underwriters sought the whole recovery from the United States, not only for the proportion of the value of the vessel insured by them, but for the large excess value of the vessel which was not insured by the petitioners;* second, the underwriters claimed the amount of the legal and other

* This claim has been abandoned in this Court.

expenses necessary to collect their share of the recovery, and in addition claimed interest at 6% on the amounts paid by them under their policies, although no interest was recovered from the United States.

The answers (R. 8, 15, 22) deny the claim of the petitioners and assert that the assured respondent, jointly with the petitioners, employed counsel and incurred expenses to prosecute the claim against the United States for the interest of the underwriters and owner, and that a recovery was made from the United States, which did not include any interest, and that the recovery was apportioned in accordance with the loss suffered by the underwriters and owner with a proportionate deduction for the costs and legal expenses, and that, therefore, the Insurance Companies have received all that they are entitled to by way of subrogation.

Practically all of the facts are stipulated.

Testimony of one witness for the petitioners was taken. (R. 31-38)

After the trial decision was reserved. Verdicts were directed for the petitioners on December 30, 1936. (R. 83)

The effect of the verdicts was to allow the petitioners' claim for recovery of the amounts deducted as petitioners' share of the legal and other expenses of the recovery. Recovery, however, was not permitted for interest on the amounts paid by the underwriters, because no interest was recovered from the United States. The decision also denied the underwriters' claim that they were entitled to the whole of the recovery, regardless of the limited amount which they insured. Both sides appealed. (R. 85, 88, 92, 95, 98, 101)

Facts.

On May 1, 1918, the United Fruit Company took out a number of Hull policies on the *S. S. Almirante* with American and British Hull underwriters. These policies totaled $582,002.25, on an agreed valuation of $632,610.00 (Ex. 9, pp. 46-50).[1]

The American Hull insurance was $284,673, and the English Hull insurance $297,329.25 (£61,305 @ $4.85, Ex. 9, pp. 46-50).

Of the American Hull insurance the petitioners insured the following amounts:

Aetna Insurance Company[2]	$18,978
Boston Insurance Company[3]	15,815
Union Marine Insurance Co.[4]	6,326

For this insurance the United Fruit Company, of course, paid a substantial premium. Underwriters have had the use of these premiums since 1918.

In addition, in order to cover disbursements and other miscellaneous losses which an owner always incurs in connection with a total loss of a ship, such as loss of freight and future earnings, disruption of business, etc., and which are not taken care of by a recovery of any part of the value of a ship, the United Fruit Company took out with

---

[1] This exhibit is a bound Recovery Statement prepared by Insurance Adjusters. By stipulation it was not printed. Copies were filed with the record.

[2] *Plaintiffs' Exhibit 6* (R. 63-65).

[3] *Plaintiffs' Exhibit 7* (R. 66-68).

[4] *Plaintiffs' Exhibit 8* (R. 69-71).

English underwriters, "P.P.I."[1] policies amounting to $173,945.25.[2]

The policies had nothing to do with value of the Hull.

The Fruit Company also took out with English underwriters P.P.I. policies covering *"increased value hull and machinery"* in the amount of $141,614 (£29,240 @ $4.85) (Ex. 1, R. 43, 44, attached stipulation, *Plaintiffs' Exhibit 1*, R. 40).

The English P.P.I. policies were honor policies. The United Fruit Company could not have sued on them, nor could the underwriters, in event of payment, sue the Fruit Company for any part of its return.

When the recovery was made from the United States, the Fruit Company, at the specific request of English P.P.I underwriters, made a voluntary return to them of $85,999.64. This was an act of grace on the part of the Fruit Company. They were under no legal obligation whatsoever.

The precise situation, therefore, with respect to the Fruit Company's loss of the vessel and recovery from underwriters and the United States was as follows:

---

[1] These letters stand for Policy Proof of Interest.

[2]

"Disbursements and Excess Liabilities" (Exhibit 2 (R. 45, 46), attached Stipulation, *Plaintiffs' Exhibit 1*, R. 40)	£27,740
"Freight" (Exhibit 3 (R. 47, 48), attached Stipulation, *Plaintiffs' Exhibit 1*, R. 40)	£ 5,625
"Disbursements" (Exhibit 4 (R. 49, 50), attached Stipulation, *Plaintiffs' Exhibit 1*, R. 40)	£ 2,500
	£35,865
@ $4.85	$173,945.25

Value of Vessel September 6, 1918 (Ex. 9, p. 27)			$1,750,000.00
Paid by American Hull Underwriters		$284,673.00	
Paid by British Hull Underwriters £61,305 @ $4.75¾ (Supplemental Stipulation, par. 3. *Plaintiffs' Exhibit 5*, R. 61)		291,658.53	
Paid by English P.P.I. Underwriters, Increased Value Hull and Machinery, £29,240 @ 4.75¾ (Supplemental Stipulation, par. 3, R. 61; Exhibit 1, R. 43, 44, attached to original Stipulation).		139,109.30	
Recovered from United States for owners	$976,288.10		
Less Recovery for interests other than Hull	13,013.38	963,274.72	
Total received by Fruit Company for Hull			$1,678,715.55
Net Loss of Fruit Company on whole transaction			$ 71,284.45

The petitioners' statement of the respondent's financial position as a result of the loss of its vessel, the *Almirante*, is inaccurate and misleading. For instance, in their computation they state, pages 4 and 5 of the Brief:

> "* * * after collecting the judgment in the collision suit the respondent had in hand the following sums in respect of the loss of the *Almirante*."

"Carried by respondent as self-insurer $50,609.00."

It is obvious that this amount represents an uninsured loss of the respondent for which it has never been indemnified. It cannot constitute sums in hand. The petitioners

also rely on an inadvertent statement in the answers that certain insurance was insurance on hull, when it is perfectly clear from the policies which are all in evidence, (see footnote 2, page 5) that this was insurance on risks other than hull.

In addition respondent is out of pocket large sums paid as premiums. Respondent has suffered substantial financial loss from this disaster and the petitioners, its underwriters, are seeking to increase that loss and to indemnify themselves in priority to their assured.

On September 6, 1918, during the currency of the Hull policies, the *Almirante* collided with the tanker *S.S. Hisko,* owned by the United States of America, and was a total loss. Following this loss the Hull underwriters paid the United Fruit Company, as they were bound by their policies to do, the sum of $576,331.53.

Upon payment of the loss, both the petitioner Boston Insurance Company and the petitioner Union Marine & General Insurance Company took subrogation receipts from the Fruit Company. The subrogation receipt of the Boston Insurance Company is Plaintiffs' Exhibit 3 (R. 56). Said receipt reads in part as follows:

> "We do hereby sell, assign and transfer to said Boston Insurance Company all our rights and interest in the above to the extent of $15815.00 to have and to hold the same to the said Company its successors and assigns to their own use forever."

The subrogation receipt of the Union Marine Insurance Company appears as Plaintiffs' Exhibit 6 (R. 62). Said receipt reads in part as follows:

> "In consideration * * * we hereby assign to you all of our rights and claims to any sum or sums of money to the extent of but not exceeding $6326.— * * * We further undertake if called upon by you so to do ourselves to undertake any such action or proceedings as you may direct on your behalf, it being understood that you are to indemnify us against any costs, charges or expenses to be incurred in respect of any proceedings to the extent of but not exceeding $6326—taken by virtue of this agreement."

A large number of the American underwriters took these subrogation receipts. A substantial number, in addition, specifically agreed with the Fruit Company to indemnify the Fruit Company for their share of the legal expenses if action were taken.

At the time of the collision, as the Court subsequently found, the *Almirante* was worth $1,750,000.00. (Exhibit 9, p. 27) Her coal, supplies and other equipment not included in the value of the vessel, were worth $12,193.02. The balance of the recovery from the United States, $820.36, represented expenses occasioned by the collision. (*Exhibit 9*, p. 27)

Thereafter in accordance with the subrogation receipts all of the Hull underwriters, both British and American, including the petitioners, and the respondent *jointly* retained attorneys to prosecute the claim for damages occasioned by the loss of the *S.S. Almirante* against the United States of America as owner of the *S.S. Hisko*. (R. 41)

Thereafter the attorneys retained jointly by the Hull underwriters, including the petitioners, and the respondent, pursuant to their retainer and pursuant to the instructions of the respondent and the Hull underwriters, including the

petitioners, petitioned for the passage of a Special Act of Congress authorizing suit against the United States of America (R. 41).

Notwithstanding the efforts of the attorneys acting jointly for the Hull underwriters and the respondent, the Special Act of Congress, which was passed, expressly provided that no interest was to be allowed on any recovery from the United States.[1] (R. 41)

After the passage of the Special Act of Congress and pursuant to their retainer jointly by the Hull underwriters, including the petitioners, and the respondent, and pursuant to their express instructions, the said attorneys filed suit in the name of the United Fruit Company in the United States District Court for the Southern District of New York against the United States of America as owner of the *S.S. Hisko*, and recovered the sum of $1,761,693.02 as the actual value of the *S.S. Almirante* and her equipment at the time of her loss.[2] (R. 41)

Of the sum recovered, $1,750,000 represented the actual value of the vessel, and the balance, to-wit: $13,013.38, represented coal, equipment, other supplies, and expenses.

The payment of this judgment was received by the attorneys acting jointly for the Hull underwriters, includ-

---

[1] This was the general Governmental policy, of which this Court takes judicial notice.

"We are satisfied by the argument for the Government that the policy thus expressed in the Act of 1925 [a Special Act not bearing interest] had been the policy of the United States for years before 1922, and that the many private acts like the present generally have been understood, before and since the act now in question, not to carry interest by the often repeated words now before us." *Boston Sand Co.* v. *United States*, 278 U. S. 41, 47.

[2] The opinions of the Circuit Court of Appeals are reported at 34 F. (2d) 123 (on the merits), and at 54 F. (2d) 540 (on damages). The District Court opinions are reported at 1931 A. M. C. 347, and 1928 A. M. C. 1730.

ing the petitioners, and the United Fruit Company, on July 26, 1932. (R. 41)

In accordance with the provisions of the Special Act of Congress, under which the suit had to be brought, no interest was allowed on the recovery and no interest was in fact recovered.

The reasonable necessary legal and other expenses incurred by the petitioners and respondent in respect of said litigation, after deduction of taxable costs recovered, amounted to $300,024.33. (R. 41)

The precise sums received by the three petitioners and the method of arriving at the sums so paid are shown in the stipulations, par. 16. (R. 42)

In accordance with the usual custom, Messrs. Johnson & Higgins were employed to prepare a Recovery Statement. This Recovery Statement is in evidence as Exhibit 9 and by stipulation, par. 17, Plaintiffs' Exhibit 1 (R. 42), is *prima facie* evidence of facts stated therein. The Recovery Statement is not printed in the Record, but copies have been filed with the record.

It will be seen from the Recovery Statement that all Hull underwriters, both American and English, were treated precisely alike. The attorneys who had been jointly retained to carry on the litigation were requested to apportion their fee and other expenses between the Hull underwriters and the United Fruit Company. The attorneys apportioned these expenses one-fifth among all the Hull underwriters, English and American, and four-fifths to the United Fruit Company. *Plaintiffs' Exhibit 9*, p. 38.

Accordingly, each Hull underwriter received the amount that it paid under its policy in 1918, plus a small amount of bank interest earned on the money while it was in the hands

of attorneys for both parties after the judgment had been collected, but before it was distributed, less each underwriter's proportionate share of the cost of the services and disbursements of their own lawyers.

Thus, each Hull underwriter, including the petitioners, received exactly the amount it paid in 1918, less the exact amount paid to its own attorneys for collecting it from the United States.

Neither the Hull underwriters nor the United Fruit Company received any interest, because no interest was recovered and, consequently, there was no interest for the attorneys or the Fruit Company to account for.

All of the English Hull underwriters accepted the apportionment of the recovery on the basis above outlined (Grant, R. 36, 37). The case presents the anomaly of Mr. Grant's company prosecuting a claim in the United States as an American Hull underwriter and accepting the accounting in London as an English Hull underwriter. Grant's company was not interested as a P. P. I. underwriter.

After the award had been collected, the English P. P. I. underwriters, who had originally paid their honor policies, inquired of the Fruit Company whether, in view of the amount recovered, the owner would be willing to compensate them by making some equitable refund. While the owner was under no legal obligation to make any refund (*Edwards & Co.* v. *Motor Union Insurance Co.*, [1922] 2 K. B. 249), just as the P. P. I. underwriters had been under no legal obligation to pay the owner, the United Fruit Company appreciated the equities involved and voluntarily refunded to the P. P. I. hull underwriters the sum of $85,999.64. These P. P. I. underwriters had paid the Fruit Company in 1918 on a P. P. I. policy covering "Increased

Value, Hull and Machinery" the sum of $139,109 (*Supplemental Stipulation*, par. 3, R. 61).

Mr. Grant of the Thames & Mersey Company agreed that this action on the part of the owners was commendable. (R. 35)

The Policies of Insurance.

The policies of Hull insurance involved in this litigation were unusual.[1] The usual form of policy was almost completely supplanted by a special printed rider.[2]

Each rider contained a special valuation clause on the *Almirante* of $632,610.00.

> "This insurance to attach and cover upon the steamers named and for the amount designated upon each in the following schedule, and for so much as concerns the assured, by agreement between the assured and assurers in this policy each of said steamers shall be valued as shown below:"

It is on these words alone that Petitioners base their entire case.

The standard form of policy to which the special rider was attached had contained the customary warranty that the amount insured for account of the assured and/or their managers on Disbursements, Commissions, or similar interest "P. P. I.", should not exceed 15% of the insured valuation, with certain exceptions. *This warranty was supplanted by the following clause* in the rider:

---

[1] Aetna Pl. Ex. 6, R. 63-65; Boston, Pl. Ex. 7, R. 66, 68; Union Marine, Pl. Ex. 8, R. 69, 71.

[2] The riders in each case are identical except as to names, dates and amounts.

"It is agreed that the owners and/or managers are at liberty to insure Disbursements and/or other interests to any amount at their own absolute discretion: and the Underwriters hereby waive disclosure of the amounts so insured."

By the express terms of the policy the Fruit Company was given the right to take out as much additional insurance as it chose, and was not limited to the standard of 15% above the amount stated in the valuation clause. Thus the Fruit Company, by terms of the special rider to the policy, had contracted for the right to take out additional insurance *to any amount,* or, of course, to assume such additional amount itself. The terms of the policy clearly show that the Fruit Company was to be a co-insurer above the amount named in the policy. In fact, the Fruit Company expressly reserved the right to take out such further insurance.

In this case the Fruit Company elected to assume, itself, the risk of loss of the value of the ship above $715,440.83, the amount insured under the Hull policies and the English P. P. I. policy on "Increased Value, Hull and Machinery."

Moreover the Fruit Company not only contracted expressly for the right to take out additional insurance and to act as a co-insurer, but stipulated that it should recover for partial losses up to the amounts of the policies irrespective of the value of the vessel. A special clause was inserted in the rider to the policy, reading as follows:

"This insurance is fully to indemnify the assured for any and all charges and expenses applicable to the vessel in respect of the perils insured hereunder, *irrespective of the value of the vessel,* and this policy shall pay its share of such charges and expenses in

the proportion which the amount hereby insured bears to the value as declared herein." (Italics ours.)

Thus, it is clear that by the terms of the policy rider, the Fruit Company and the Hull underwriters were co-insurers in respect to total losses. With respect to partial losses, the underwriters, notwithstanding they were co-insurers as regards total losses, had contracted specifically to pay full indemnity up to the amounts insured.

The partial loss provision is quoted above.

In this case if there had been a partial loss the underwriters in view of their contract would have had to pay 100% of such partial loss up to the amount insured, irrespective of the value of the vessel, and would have been entitled to 100% of the recovery of the amounts paid.*

In the case of total loss as here, the rule is entirely different. The underwriters pay merely the total amount of the policy and the owner loses the value of his vessel over and above the amounts paid by the underwriters. In this case the underwriters would have paid approximately 33⅓% of the actual loss and the Fruit Company would have assumed approximately 66⅔% of the loss. In case of total loss, therefore, the recovery is divided in the same proportion as the loss.

In the case of such total loss the underwriters are subrogated to any recovery to the extent of the amount paid

---

* Partial losses to vessels are usually determined by the cost of repairs. The actual or agreed value of the vessel does not affect the matter at all. See page 47.

under their policies, and the owner is entitled to the balance. *The Livingstone,* (C. C. A. 2) 130 Fed. 746.

As shown by *The Livingstone* case, the agreed valuation clause has nothing to do with subrogation in a case of total loss.

The Decision of the District Court.

Judge Patterson in the District Court held, (R. 100) 18 F. Supp. 441:

> 1. Underwriters were subrogated to the claim of the owner against the United States to the extent of the amounts actually paid by each underwriter.
>
> 2. Underwriters were not subrogated to the entire claim of the owner against the United States.
>
> 3. Underwriters were not entitled to interest from the assured on the amounts paid by them because none was recovered from the United States.
>
> 4. Underwriters were not required to bear a proportionate share of the cost of making recovery against the United States.

He found authority for these holdings in a landmark decision, *The Livingstone,* 130 Fed. 746, reversing 122 Fed. 278.

His ruling on the first three points is clearly supported by the principle and facts of that case. His ruling that the underwriters do not have to bear a portion of the expenses was based on a sentence in the opinion dealing with costs, which did not involve any ruling or decision applicable to the facts here presented. This error was corrected by the Circuit Court of Appeals.

The Holding of the Circuit Court of Appeals.

The Circuit Court of Appeals (Judge Learned Hand writing. R. 107) held that the distribution of recovery between the owner and underwriters had been made in accordance with the established rules of subrogation as well as with co-insurance principles in total loss cases. That under such rules, the underwriters were obligated to pay their share of legal expenses for their own lawyers and were not entitled to recover interest for the reason that no interest was recovered from the United States. The Court held that the decision of *The Livingstone* was complete authority and that the Court in that case expressly approved the rules applied in this case, and that the statement in the opinion of that Court concerning payment of costs did not involve any ruling on the question of subrogation.

The Court further held that the decisions in this country, including a number of decisions of this Court, hold that the subrogation rights are not affected by the agreed valuation clauses. The Court clearly pointed out the errors of the dictum of *North of England Association* v. *Armstrong,* L. R. 5 Q. B. 244. The Court also pointed out that the reasoning of that dictum had been followed in a number of *partial loss* cases in lower courts. *The St. Johns,* 101 Fed. 469.

The Court held that such partial loss cases were not applicable to this case, and that in so far as the reasoning of *The Armstrong* case with respect to estoppel was adopted, they were probably wrong.

The Court also pointed out that the citation of *The Armstrong* case in *The Potomac,* 105 U. S. 630, 635, was merely an illustrative citation and not one of approval.

FIRST POINT.

THE RECOVERY FROM THE WRONGDOER WAS DISTRIBUTED ON PRINCIPLES OF SUBROGATION IN ACCORDANCE WITH EQUITY AND JUSTICE.

The situation disclosed by the undisputed facts is that when the owners lost their vessel in 1918 she was worth $1,750,000.00.

Pursuant to certain Hull insurance policies for which they had paid a large premium, the owners received from the Hull underwriters, including P. P. I. increased value, the sum of $715,440.83. The owners were, therefore, out of pocket, in respect to the value of the vessel, the sum of $1,034,559.17. Neither in respect to that part of the recovery from the wrongdoer, the United States, represented by the payment by underwriters, nor to the Fruit Company's share of the recovery for Hull, was any interest paid or recovered. If the Hull underwriters, who had been paid a premium for assuming a risk, can be said in any strict sense to have been deprived of the use of the money that they paid under their policies from the time of payment to the date of the distribution of the award, July 26, 1932, it is equally true that the Fruit Company has similarly been without any compensation for the use of its money during that same period.

The difference is that the underwriters were paid by the Fruit Company for assuming the risk of being out the very money they are complaining about, whereas no one has paid the Fruit Company for taking such a risk.

Underwriters still have the owners' premiums in their pockets and have enjoyed their use since 1918. As the Court said in *The Livingstone,* 130 Fed. 746, 749: "The premium is supposed to be a full consideration for the risk."

If any interest, compensation or profit is to be allowed to the Hull underwriters, it must come out of the Fruit Company, because no interest was recovered from the wrongdoer.

In looking at the equities of the situation, however, it must be borne in mind that, in respect to the Hull underwriters' complaint of not having the use of certain money, the Fruit Company had paid to the Hull underwriters a premium for assuming the risk, not only of being out the use of the money for a limited period of time, *but of being out the use of the money for all time.* It is neither just nor equitable that the Hull underwriters should receive interest from the Fruit Company which the Fruit Company did not receive from the wrongdoer, in connection with a risk which the Fruit Company paid the Hull underwriters to assume.

Equity requires that the Fruit Company should first receive indemnity.

It is clear that whatever rights the Hull underwriters have arise by way of subrogation. This is why most of the underwriters demanded and received "subrogation" receipts which divided up the claim.

A. *The cardinal rule of insurance is that the assured is to be indemnified first and that the only purpose of subrogation is to prevent the assured getting more than indemnity.*

In *Chapman* v. *Hoage,* 296 U. S. 526, at 531, the Court said:

> "* * * The insurer is given a right of subrogation not to enable him to avoid his undertaking to indemnify but that it may not be enlarged beyond that of indemnity. *Standard Marine Insurance Co.* v. *Scottish Metropolitan Assurance Co., Ltd.*, 283 U. S. 284, 288."

In *Standard Marine Ins. Co.* v. *Assur. Co.*, 283 U. S. 284, 288, the Court said:

> "* * * The object of subrogation is to make indemnity to the insured, up to the amount of the policy, the measure of the liability of the insurer, and that is its justification. But the liability would be less than such indemnity if the insurer could be subrogated to a right of recovery by the insured for a loss other than that insured against."

In *Aetna Casualty Co.* v. *Phoenix Co.*, 285 U. S. 209, 214, the Court said:

> "* * * That privilege [subrogation] was a necessary incident to petitioner's contract, for only by resort to it could the character of the contract as indemnity be preserved. It is both the object and the justification of subrogation that it makes exact indemnity the measure of the liability. See *Standard Marine Insurance Co., Ltd.* v. *Scottish Metropolitan Assurance Co., Ltd.*, 283 U. S. 284; *United States* v. *American Tobacco Co.*, 166 U. S. 468; *St. Louis, Iron Mountain & Southern Ry. Co.* v. *Commercial Union Ins. Co.*, 139 U. S. 223, 235; *Hall & Long* v. *The Railroad Companies*, 13 Wall. 367; *Jones* v. *Bacon*, 145 N. Y. 446, 450; 40 N. E. 216."

A similar effort by underwriters to avoid their obligations to indemnify their assured in disregard of the true

purpose of subrogation was recently defeated by this Court. in *The Dixon-King (Great Lakes Transit Corp.* v. *Interstate Steamship Co.)* 301 U. S. 646. In that case the Court said:

> "* * * the equity of subrogation invests the underwriters with the rights of the assured against third persons * * * not with a right to override its own obligation to the assured. * * *"

It is clear from the cases cited above and from *The Livingstone,* 130 Fed. 746, that the sole purpose of subrogation is to distribute a recovery between the assured and their underwriters in such a way that the assured will not receive more than indemnity. Clearly in this case the assured has not received full indemnity.

Petitioners contend for the exact opposite of this rule. They claim that the purpose of subrogation is to distribute a recovery in such a way that the underwriters will first receive full indemnity, with interest at 6%; the interest or profit at the expense of the shipowner to whom they issued a policy of indemnity for a large premium, and who has not yet received full indemnity for his loss from all sources.

In *The Livingstone,* 130 Fed. 746, the Court pointed out at page 747 the inequity of permitting an underwriter to make an enormous profit at the expense of his assured.

Whether you call the interest demanded here by the Hull underwriters an "enormous profit" or "compensation for the use of the money", the fact remains that it is a compensation which would have to come out of the United Fruit Company. By so much more will it fail to have been indemnified for the loss of its ship.

We cannot help wondering whether underwriters would claim that they are entitled to 6% interest in every case of this character.

Under the Act, under which this suit was brought, no interest was recoverable from the United States. Today, under the Admiralty Suits Act,* if the United States is held as a wrongdoer, the owners can recover the amount of their loss, *plus 4% interest.* If the Hull underwriters are correct in their contentions, they would in such a case today be subrogated not merely to the amount of interest recovered from the Government, namely, 4%, but would be entitled, in addition, to an extra 2% out of the owner's pocket to make up a rate of 6% as claimed here.

Whatever the interest demanded in this case is called, it is clear that it represents substantial compensation for the use of the money. There is no proof in the Record that the underwriters could have earned any interest or profit if they had had the use of the money.

Interest is ordinarily payable as a result of an express or implied contract to pay money at a specified time, or for a wrongful withholding or non-payment of an obligation to pay money when due.

The Fruit Company had no contract to pay money to the underwriters. In fact, the contract was that the underwriters would pay the Fruit Company a certain sum of money in a certain eventuality, which happened, to-wit: the loss of the ship. There was no promise on the part of the Fruit Company to return the money with or without interest. The wrongdoer, the United States, paid no interest.

---

* 46 U. S. C., s. 743.

Certainly, neither the Fruit Company nor the attorneys for both parties were under any obligation to account to the Hull underwriters until the money was received from the wrongdoer on July 26, 1932. The relationship here was really that of a trustee. The general rule is that a trustee is not liable for interest unless interest is collected.

The District Judge said (R. 82):

> "Here the defendant took nothing by way of interest. It got no redress as to that element of its loss. As to interest it held nothing as trustee for the plaintiffs, and their right of subrogation gives them nothing. See *Standard Marine Ins. Co.* v. *Scottish Metropolitan Assn. Co.*, 283 U. S. 284, 288."

B. *The recovery was distributed to underwriters and assured in exact conformity with the equitable doctrine of subrogation.*

In Marine Insurance owners and underwriters are regarded as co-insurers. *The Potomac,* 105 U. S. 630, 634-635; *Norwich Union Fire Ins. Soc.* v. *S. O. Co.* (C. C. A. 8), 59 Fed. 984; *The Commonwealth,* [1907] P. 216, 223. By reason of the co-insurance principle in admiralty, decisions often describe subrogation as an assignment to the underwriter, as of the time of payment of loss, of an interest in the cause of action against the wrongdoer proportionate to the amount of the loss paid by the underwriter. If the underwriter pays 100% of the loss, he owns the entire cause of action; if he pays 50% of the loss, he owns half the cause of action and the assured owns the other half.

The subrogation receipts in this case were carefully worded in accordance with this principle, and, as the Court below pointed out, this simple logical principle of equity has been scrupulously observed.

This is readily demonstrated. Boston Insurance Company, for instance, paid under its policy $15,815. Its subrogation receipt contained an assignment of the cause of action *"to the extent of $15,815"*. (R. 24)

Thereafter Boston Insurance Company, together with the other owners of the cause of action (the remaining underwriters and the assured), employed counsel to prosecute. Boston Insurance Company's counsel recovered for it $15,815, *without interest*. Counsel then deducted their fee and paid Boston the balance of the recovery.

These are the stipulated facts of this case. The adjustment made by Johnson and Higgins, described by the Court below as "well known marine insurance agents", was made on these elementary principles. As Judge Hand said "* * * we do know that it [the distribution statement] was prepared by persons especially versed in such questions, and they at any rate followed the orthodox rule". *St. Louis Iron Mountain and Southern Ry. Co.* v. *Commercial Ins. Co.*, 139 U. S. 223, 235; *Liverpool Steam Co.* v. *Phenix Ins. Co.*, 129 U. S. 397, 462; *The Potomac*, 105 U. S. 630, 634; *Norwich Union Fire Ins. Soc.* v. *S. O. Co.* (C. C. A. 8), 59 Fed. 984, 987.

The reason that the underwriters did not receive interest was that their attorneys could not recover interest from the United States. The assignment to underwriters of a portion of the cause of action gave them only the assured's rights as to the part assigned; they acquired no other right either against the assured or the wrongdoer. *Standard Marine Ins. Co.* v. *Assur. Co.*, 283 U. S. 284; *Luckenbach* v. *McCahan Sugar Co.*, 248 U. S. 139, 146; *Mobile & Montgomery R. Co.* v. *Jurey*, 111 U. S. 584, 594; *Boag* v. *Standard Marine Ins. Co.*, (C. A.) 57 Ll. L. 83.

The reason underwriters had to pay their proportionate share of legal expenses was that they retained the lawyers and promised to pay them and, in fact, did pay them voluntarily. In the Union Marine receipt there was an actual written agreement to pay the legal expenses. (R. 17) No good reason has been suggested why such an agreement is not binding. The Fruit Company performed its part.

The distribution of the recovery in this case has been made in punctilious conformance with every principle of equity as applied in trusts, agency and insurance. *Federal Ins. Co.* v. *Det. F. & M. Ins. Co.*, (C. C. A. 6) 202 Fed. 648, 654; *Sun Insurance Office* v. *Hohenstein*, 128 Misc. 870; *The Commonwealth*, [1907] P. 216; *Assicurazioni* v. *Empress Assur. Corp.*, [1907] 2 K. B. 814, 821; *The Welsh Girl*, [1906] 22 T. L. R. 475; *Duus Brown & Co.* v. *Binning*, [1906] 11 Com. Cas. 190, 194.

SECOND POINT.

THE EQUITABLE PRINCIPLES OF SUBROGATION ARE NOT CHANGED BY THE AGREED VALUATION IN THE POLICIES.

Petitioners attempt to gloss the true character of their claim with the adjective "conventional". The convention being that, under the policies, if a total loss occurred it was agreed that it would not be necessary for the assured to produce evidence as to the *Almirante's* value; as a simple means of fixing the loss it was agreed for mutual convenience that her value was $632,610.

The "convention" was only the familiar stipulation for liquidated damages. The agreed valuation in this case was a conditional contract that lapsed because the condition

never occurred. It had no effect on the amount paid by the underwriters. No case in the history of American or British Maritime Law supports petitioners' "conventional" claim. The only previous assertion of petitioners' claim that "the agreed value is binding for all purposes" was condemned by the Second Circuit in *The Livingstone*, 130 Fed. 746, which has stood for years.

A. *The agreed valuation had no effect on the amount paid by underwriters.*

To illustrate the immateriality of the agreed valuation with respect to facts involved here, we will again use the Boston Insurance Company's position as being fairly illustrative.

Boston insured the *Almirante* for $15,815. Boston and assured agreed that in event of total loss, assured would not have to bring in experts' opinions or other proofs as to her value. She was a total loss, so Boston paid the full amount of its cover. The real value of the *Almirante* was $1,750,000. The agreed valuation, $632,610, therefore, had no effect on the amount paid by Boston; on the basis of the agreed valuation it paid $\frac{15,815}{632,610}$ of $632,610; without the valuation it paid $\frac{15,815}{1,750,000}$ of $1,750,000.

Petitioners' claim, therefore, has no basis in fact; not a single circumstance affords any support for petitioners' attempt to avoid simple principles of justice and equity. Petitioners may well claim that they assert merely "conventional" rights.

B. *An agreed valuation does not affect the equitable principles of subrogation.*

Subrogation is a device of equity which is employed by the court after an underwriter has paid a loss on a policy

and after the assured has made a recovery from the wrongdoer, and it is only employed to prevent the assured from getting more than indemnity. See decisions of this Court cited *supra,* pp. 18, 19.

Agreed valuation is a device employed by underwriters and policy holders for their mutual convenience to facilitate adjustment of total losses—a stipulation for liquidated damages when the ship is destroyed.

The Circuit Court of Appeals in *The Livingstone,* 130 Fed. 746, 748-9 said:

> "The valuation clause was originally adopted in marine policies to avoid the difficulty and sometimes the impossibility of ascertaining with precision the value of the property insured. As this was the first step in the accurate measurement of the loss the insurer and insured agreed upon a value which, as between them, was to be taken as the basis of subsequent calculations. Why the agreement of the parties upon a convenient basis of calculation should operate to change the principle upon which the insurer had, theretofore, been reimbursed to the extent of his payment under the policy, it is not easy to understand. The reason of the rule is plain. A contract of insurance is one of indemnity. The premium is supposed to be a full consideration for the risk. Nevertheless, where the insurer has paid the entire amount of the loss he becomes subrogated, to the extent of his payment, to whatever interest the insured has in the property and to the latter's right to proceed against one who has negligently caused the loss."

This language was approved and followed in *Mutual Fire Insurance Co.* v. *Budd,* 208 Mich. 483, and was carefully considered and re-affirmed by Judge L. Hand in this case.

The same principle is stated in *Eldridge on Marine Policies,* 2d Ed. p. 90:

> "The valuation in the policy is, in the absence of fraud, binding upon the parties for the purpose of ascertaining the amount to be paid by the underwriter in the case of either total or partial loss (*Irving* v. *Manning,* 6 C. B. 420); and the valuation has no other effect, notwithstanding the language which Lord Campbell is reported to have used in the above case, where he says that the valuation is 'for *all* purposes,' and a like statement by Mellor, J., that '*all* questions as to the mutual rights of the assurer and the assured must be governed by the value stated in the policy' (*North of England Iron S.S. Assoc.* v. *Armstrong,* L. R. 5 Q. B. 244).
>
> "Hence the valuation in the policy is not apart from contract the value of the ship for the purpose of determining whether the ship is a constructive total loss, since for *that* purpose the repaired value must be considered (*Irving* v. *Manning,* 6 C. B. 391). Nor is the valuation binding upon any one except the parties to the policy and their assignees (*Bousfield* v. *Barnes,* 4 Camp. 228), but as between these parties the valuation will be binding in the absence of fraud or such excessive valuation as amounts to fraud."

A Note Editor at 29 Harvard Law Review 553, 554 reached the same conclusion:

> "* * * It is submitted that a 'valued' policy of the type in the principal case should effect no change in this result: in such a policy the whole vessel is insured, the clause stating the agreed value being inserted only in order to save the expense and doubt that may attend a later investigation of value in case of loss. In this respect it resembles an agreement

> for liquidated damages, and is to be sharply distinguished from insurance of a certain amount taken on a vessel. * * * Since in subrogation we must first see the insured made whole, and since actual value has been made the basis of recovery from the tortfeasor, that value and not the agreed value should be the basis of distributing the fund recovered. For this neither violates the contract nor protects the insured in any wrong. * * *"

See also *Pleasants* v. *Maryland Ins. Co.*, 8 Cranch 55; *Columbia T. Co.* v. *Norske Lloyd Ins. Co. Ltd.*, 100 Misc. 550, affirmed 229 N. Y. 556.

THIRD POINT.

THE DECISIONS RELIED ON BY PETITIONERS HAVE BEEN EXPRESSLY REPUDIATED IN THIS COUNTRY, CRITICIZED IN ENGLAND, AND ARE BASED ON PRINCIPLES RECENTLY DISAPPROVED BY THIS COURT.

Petitioners' original position was that the "agreed valuation" was binding for all purposes, and that they were entitled to the entire recovery from the United States.

The claim for the entire recovery has now been abandoned. (Petitioner's Brief, p. 8) This is, of course, a concession that the "agreed valuation" is not binding for all purposes.

Petitioners' contention, or so much of it as now remains, is based on a dictum in *North of England Association* v. *Armstrong*, L. R. 5 Q. B. 244.

The case of *North of England Association* v. *Armstrong, supra,* arose at a time when the valuation clause was new

and the judges in England had not become familiar with its real purpose. The decision has been criticized in later decisions. *Burnand* v. *Rodocanachi,* [1882] L. R. 7 App. Cas. 333, 342; *Goole & Hull Steam Towing Co.* v. *Ocean Marine Ins. Co.,* [1928] 1 K. B. 589, 597; Halsbury's, *Laws of England,* s. 973, vol. 17; and see *S. S. Balmoral Co. Ltd.* v. *Marten,* [1902] App. Cas. 511, 514; *Pitman* v. *Universal Marine Ins. Co.,* [1882] L. R. 9 Q. B. D. 192; *Irving* v. *Manning,* 6 C. B. 391, 136 E. R. 1302.

The Armstrong decision is based entirely on the notion that the application of agreed valuation depends upon estoppel. This Court in *Gulf Refining Co.* v. *Ins. Co.,* 279 U. S. 708, 712, has said:

> "The application of the agreed value to the adjustment of the insurance loss does not depend on estoppel * * *."

The dictum of the *North of England Association* v. *Armstrong,* L. R. 5 Q. B. 244, which would give underwriters the whole recovery where the insurance was for less than the value of the vessel, was expressly repudiated in *The Livingstone,* 130 Fed. 746, where the Court said, pages 749, 750:

> "* * * That decision carries no greater weight in this country than is compelled by the force of its reasoning, and, after careful consideration, we are unconvinced by its logic and are unable to accept its conclusions. It proceeds upon what, to our minds, is an unnecessarily harsh and inequitable exposition of the rights of the insured, based upon the assumed change in the law produced by what the Chief Justice considered a 'new-fangled form of insurance.' * * *"

The English court considered the agreed valuation a "new-fangled form of insurance".

The Court below accurately appraised the decision in the following language (R. 166, 167):

> "As to authorities, North of England Association *v.* Armstrong, L. R. 5 Q. B. 244, (1870), supports the plaintiffs; supports them even in their claim to the whole recovery, though that point was not actually decided. It held flatly that the agreed value was an estoppel between the parties whenever value became relevant in their legal relations. That result was thought to follow upon the privilege of an underwriter, who has paid a total loss, to take over the wreck, to raise and repair it, and to make such profit from it as he can. Recovery against a tort-feasor stands precisely like the wreck, the court said; it is a substitute for the ship and the underwriter is as much entitled to it. This argument seems to us fallacious. In the first place, the owner often in fact abandons the wreck, though the underwriters' privilege does not in law depend upon it; and so far as we are advised, no case has arisen in which an underwriter has actually profited out of the wreck, when the owner did not abandon. But assuming that in such a case he might retain any profit, that is irrelevant here. An owner who receives payment of a total loss and who, even though he does not expressly abandon the wreck, allows the underwriter at his own cost to raise and restore it, may well have no equitable claim to any resulting profit. But an owner who, not being covered by his hull insurance, actively prosecutes a right of action against a tort-feasor—especially when, as here, he does it in conjunction with his underwriter—shows as plainly as possible that he means to assert an interest in it, which would be grossly unjust to give to the underwriter after the

owner has won. Yet, unless one is prepared to go so far as this, the reasoning of North of England Association *v.* Armstrong, *supra,* (L. R. 5 Q. B. 244), will not serve, for there is no antecedent ground for saying that the agreed value must be an estoppel for all purposes. Lord Blackburn in Burnand *v.* Rodocanachi, L. R. 7 App. Cas. 333, 342, plainly disapproved the decision, and although Scrutton, J. felt bound to follow it in Thames & Mersey Marine Ins. Co. *v.* British & Chilean S. S. Co., (1915) L. R. 2 K. B. 214, he too appears to have had doubts as to its correctness (p. 221)."

The Armstrong Decision Is Based on Theories Condemned by This and Other American Courts.

Estoppel theory. As the Court below pointed out, the real basis of *The Armstrong* case is that by reason of the agreement fixing the value of the vessel for purpose of computing the insurance liability in total loss cases, the parties are estopped from ever showing the real value of the vessel under any circumstances. Even underwriters have finally abandoned that position.

We have shown that in the present case there could not be estoppel in fact, because the agreed valuation had no effect. The underwriter paid no more than he would if there had been no agreed valuation. The basic element of estoppel—reliance on a representation resulting in a change of position—is, therefore, missing.

But this Court has correctly established that the agreed valuation does not operate by estoppel. "The application of the agreed value to the adjustment of the insurance loss does not depend on estoppel * * *." *Gulf Refining Co.* v. *Ins. Co.,* 279 U. S. 708, 712.

That decision was followed by the Court below.

The Armstrong decision was based on an error of first impression by a court baffled by a new clause, "a new-fangled form of insurance". The rule of this Court was a mature judgment approving the reasoning of many inferior courts.

Gulf Refining Co. v. *Ins. Co.,* (C. C. A. 2) 27 F. (2d) 678, 679;
British & Foreign Marine Ins. Co. v. *Maldonado & Co.,* (C. C. A. 9) 182 Fed. 744, cert. den. 220 U. S. 622;
The Livingstone, (C. C. A. 2) 130 Fed. 746;
Irving v. *Manning,* 6 C. B. 391, 136 E. R. 1302;
Bradlie v. *The Maryland Insurance Co.* 12 Pet. 378, 399;
Patapsco Ins. Co. v. *Southgate,* 5 Pet. 604;
Mutual Fire Ins. Co. v. *Budd,* 208 Mich. 483;
Eldridge on Marine Policies, 2d. Ed. p. 90;

A corrollary of the rule of the *Gulf* case, above stated, is the now universal recognition of another rule of that case (p. 712):

> "The policy agreement valuing the cargo at a specified amount is not a representation, or so regarded. It is no more than a stipulation, in effect, that for purposes of computation of the insurance liability the cargo shall be taken at an agreed value. Within this limitation the policy is still a policy of indemnity * * *."

See cases cited *supra.*

> "Indeed valued insurance is only an instance of stipulated damages. *Empire Dev. Co.* v. *Title G. & T. Co.,* 225 N. Y. 53, 58."

St. Paul Fire & Marine Insurance Co. v. *Pure Oil Co.*, (C. C. A. 2) 63 F. (2d) 771.

ABANDONMENT THEORY. Sometimes after a marine disaster it is difficult to determine whether or not the loss is total. The ship may be salved or not. In such a case the owner may elect to collect his insurance as a total loss and let the underwriter worry about the hull. In such a case he may abandon to the underwriters who thereupon are vested with title to the hull. The abandonment is a contract in the nature of an accord and satisfaction; it involves a voluntary actual assignment of title to the hull. If salvage is successful, the underwriter may profit.

Subrogation is enforced by equity and does not depend on any act by the assured.

In *The Armstrong* case, the court thought the situations analogous. The Court below admirably disclosed this error of *The Armstrong* case. See language quoted page 30, *supra*.

The error of *The Armstrong* case, in likening subrogation to abandonment, has been as clearly exposed by decisions and authors as has the entire dictum relied on by petitioners.

FOURTH POINT.

The Livingstone, THE ONLY MARINE CASE IN POINT, WAS FOLLOWED IN THIS CASE.

The Armstrong case was not a total loss case in which the recovery from the wrongdoer exceeded the agreed valuation. Petitioners only rely on a dictum of that case.

The only authority here or in England before this case was *The Livingstone,* (C. C. A. 2) 130 Fed. 746. There is no question involved here of bringing our law into line with English law.

The Livingstone was a collision case. The same hull underwriters insured the *Livingstone* and the *Grand Traverse.* The *Grand Traverse* was insured on a valuation of $25,000.00. The vessel was in fact worth $37,500.00.

Against the wishes and the active opposition of their underwriters, the owners of the *Grand Traverse* brought suit against the *Livingstone.* The *Livingstone* was defended by the hull underwriters of the *Grand Traverse* and their lawyers.

The *Livingstone* was held solely at fault, with the result that the owners of the *Grand Traverse* recovered a judgment of $37,500, *with interest at 6% from the date of the loss, which was October 18, 1896.**

The hull underwriters of the *Grand Traverse* did not pay the loss on that vessel until February 19, 1897.*

Thus, in *The Livingstone* case there was an actual recovery of interest at the rate of 6% from the wrongdoer

---

* These dates are taken from the record, page 3.

for the full period during which underwriters had been out the use of their money. In fact, there was a recovery of interest from the wrongdoer for both the periods during which the owners of the *Grand Traverse* and their underwriters had, respectively, been out the use of the money. The court allowed underwriters the interest, which had been recovered from the wrongdoer, for the period during which underwriters were out the use of their money. In addition, owners received interest for the period prior to payment by underwriters and upon the excess value from the date of the loss.

The Livingstone decision represents the true principles of subrogation. There had been a recovery from the wrongdoer with interest at 6% for the full period during which underwriters were out the money, and being subrogated to the rights of the owners in respect to this interest, underwriters received the interest. As a matter of fact the underwriters being on both vessels paid the actual interest that they received back.

There was no question involved in The Livingstone case of a shipowner being compelled to hand over interest to an underwriter when in fact the owner had received no interest.

Similarly, the question of costs in *The Livingstone* case was wholly different from the question as presented in the present case. In fact, as appears from the opinion of the District Court in *The Livingstone*, 122 Fed. 278, the lawyers seem to have stipulated the matter of fees as between themselves, without reference to the court.

Nevertheless, it is clear that in that case the underwriters did not have to pay any legal expenses.

The decision of *The Livingstone,* in so far as costs were concerned, was based on peculiar facts in that case involving established principles of law not present in this case. In our briefs below we quoted from the various briefs of the parties to *The Livingtone* case, in which it appeared that the contentions of the parties, in so far as costs were concerned, were not based on principles of subrogation, but on other equitable doctrines.

The assured contended that, since he had conducted all of the litigation and had made a meritorious recovery which would benefit the underwriters, he should be given a reward for his diligence and efforts; the reward being that he should not have to pay any share of the legal expenses. He cited the case of *Newcombe* v. *Cin. Ins. Co.,* 22 Ohio St. 382. In that case the active litigant was given priority over the parties who did not join in the litigation and did not have to bear any share of the legal expenses. This is a well established principle. *Woodworth* v. *Ins. Co.,* 5 Wall. 87; *The Battler,* (E. D. P. A.) 67 Fed. 251, 253.

The underwriters on the other hand contended that the assured had not benefited them in any way by the litigation, because the recovery from the litigation came out of the underwriters' own pockets. They said it would be unjust and unreasonable for a person to have to pay for an action against himself. This is an established doctrine.

Hardman v. *Brett,* 37 Fed. 803;
Coleman v. *United States,* 152 U. S. 96;
Hobbs v. *McLean,* (1886) 117 U. S. 567.

It is our contention that the Circuit Court of Appeals in *The Livingstone,* in its discretion, decided the issue of

costs in favor of the underwriters because they did not benefit in any way from the litigation. In fact they lost by it. This is the simple logical explanation for the ruling of the court. As Judge L. Hand pointed out the entire opinion in *The Livingstone* is devoted to the demolition of the doctrine of *The Armstrong* case. The Court could not, therefore, have decided the issue of costs because of agreed valuation. It seems to us, therefore, that the ruling as to costs can be easily understood in the light of the contentions made by the parties with respect to the peculiar circumstances there involved.

The petitioners in their brief, at page 23, disregard entirely the principles on which *The Livingstone* was decided and rely only on the last sentence of *The Livingstone* opinion, which reads as follows:

> "The decree is reversed with costs of this appeal and the case is remanded to the District Court with instructions to enter a decree awarding the appellees interest on the sums paid by them during the time they were deprived of the use of said sums, and awarding the balance of the fund in court, after paying court fees and charges, to the libellants."

This sentence just quoted, however, was not an opinion that underwriters were entitled to interest which had not been received from the wrongdoer or to legal costs which they had expressly incurred for their own attorneys, because in *The Livingstone* case interest had actually been recovered from the wrongdoer, and the legal expenses had not been incurred either for the benefit of or at the request of the underwriters.

The sentence quoted dealt only with the form of the decree under the peculiar facts of *The Livingstone* case.

Neither in *The Livingstone* nor in any other case is there authority for the assertion that underwriters are entitled to interest on a loss which should have been paid by a wrongdoer when in fact the wrongdoer has paid no interest. Similarly, neither *The Livingstone* nor any other case can be cited as authority for the proposition that underwriters should not be responsible for the fees of lawyers that they themselves have retained, or for expenses incurred at underwriters' request and for their benefit.

In fact, *The Livingstone* decision, in respect to the payment of legal expenses because of the fact that the underwriters had insured both vessels involved in the collision, was really ruled by the case of *The Potomac,* 105 U. S. 630.

In *The Potomac* a collision took place between the *Robert E. Lee* and the *Potomac.* Under a policy of insurance the owner of the *Robert E. Lee* had insured her for two-thirds of her actual value by valued policies. The policies provided that in case the underwriters should pay a loss, the assured should assign to them all rights against third parties and that they should be entitled, upon recovery from the wrongdoer, to such proportion of the damage recovered as the amount insured bore to the valuation in the policies. The underwriters paid a partial loss under the policies and, after their assured, the owners of the *Robert E. Lee,* had filed a libel in the District Court against the *Potomac,* the underwriters executed and delivered to the owners of the *Potomac* an instrument in writing by which, after reciting the collision, the payment of the insurance money to the owners of the *Robert E. Lee,* and the fact that they had never authorized the bringing or prosecution of

the suit and desired no suit brought on their account, they released, discharged and set over to the owners and master of the *Potomac* "any and all right which they have in and to any damage and claim of damages, if any there be, whether legal or equitable, growing out of the said collision and authorized them to use the same by way of defense or otherwise in and to the said suit."

While it does not appear specifically from the opinion, it is obvious that the underwriters had insured both vessels and did not wish to sue themselves through a suit by the owners of one of the vessels that they had insured, against the other.

The Court held that the underwriters, by paying a portion of the loss on the *Robert E. Lee* under their policy, pursuant to the express agreement contained in that case, had acquired a proportionate share in a claim against the *Potomac* and, having acquired that right, were entitled to assign it to the owners of the *Potomac,* to be used in a set-off by the *Potomac* in the libel by the owners of the *Robert E. Lee.*

The situation in *The Livingstone* was almost precisely the same, except that in *The Livingstone* there was no formal assignment. If in *The Livingstone* case the underwriters on the *Grand Traverse,* after paying the amount of the valued policy, to wit: $25,000, to the owners of the *Grand Traverse,* had then assigned to the owners of the *Livingstone* the $25,000 interest that they had acquired in the cause of action against the *Livingstone,* then obviously the owners of the *Livingstone* could have set that up in the lawsuit and the recovery in *The Livingstone* by the owners of the *Grand Traverse* would merely have been for the excess over $25,000. In such a situation, of course, the under-

writers on the *Grand Traverse* would not be liable for any legal expenses in the suit brought by the owners of the *Grand Traverse* against the opposition of their underwriters. The underwriters in their capacity as insurers of the *Livingstone* would have been liable only for the amount of the *Grand Traverse's* claim above $25,000. So far as costs are concerned, this was the exact effect of the ruling with respect to costs in *The Livingstone* and is in accordance with the ruling of this Court in *The Potomac,* 105 U. S. 630.

The Potomac was a partial loss case and not a total loss case. The policy contained an express provision as to how any recoveries against third parties for partial losses should be apportioned. The effect of a valuation clause when the vessel was worth more than the agreed value was not involved.

The general rule in marine insurance, in the absence of an agreement to the contrary, is that the owners and underwriters are co-insurers both in respect to partial and total losses. See cases cited page 22, *supra.*

It is argued here that the agreed valuation clause takes this case out of the general rule. Such a contention, however, disregards two factors entirely.

FIRST. This was a total loss case, where the recovery exceeded the agreed valuation and the recovery from the wrongdoer was based on the real value and not on the agreed value.

SECOND. The terms of the policy clearly provided for the co-insurance principle in respect to total losses. With respect to partial losses the policies provided that partial losses should be paid up to the amount insured in the policies in disregard of the

co-insurance principle. If the agreed valuation clause took the case out of the co-insurance principle as regards partial losses, this clause was wholly unnecessary and meaningless.

As regards losses above the agreed valuation, the Fruit Company expressly contracted that it should have the right to take out as much additional insurance as it pleased, and there was a waiver in the policies as to the disclosure of the amounts.

Such insurance, if not placed on a wager basis, would share to the extent paid in any recovery against a wrongdoer on the same basis as the agreed value hull underwriters. *Brown* v. *Merchant's Ins. Co.* (C. C. A. 9) 152 Fed. 411.

That the underwriters, or at least a majority of them, understood that as respects losses in excess of the agreed valuation, the owners and/or other underwriters were co-insurers with the agreed value underwriters, is clear from the conduct of the parties after the loss. Not only did a majority of the underwriters demand and receive subrogation receipts or assignments of the claim against the wrongdoer, splitting up that claim between the interested parties, but underwriters jointly retained lawyers to seek recovery of their share of the claim. In the Union Marine case the underwriters expressly agreed in writing to pay their share of the legal expenses involved in the common adventure. The English underwriters accepted the Adjustment and carried out their agreement. American underwriters alone seek to repudiate their undertakings.

How the repudiated theory of Estoppel, first announced in *The Armstrong* case, and then followed in *The St. Johns,* in the District Court, 101 Fed. 469, could be appli-

cable under the facts of this case is not apparent. But, unless, as Judge Learned Hand pointed out in the Court below, the estoppel theory, which was disapproved by this Court in *Gulf Refining* v. *Ins. Co.*, 279 U. S. 708, is correct, then the situation is that the agreed value was only a convenient stipulation for damages and did not confer on underwriters either the right to get all of the property belonging to the Fruit Company or preference at the expense of the Fruit Company.

FIFTH POINT.

THE ERRONEOUS RULING OF *The Armstrong* RELIED ON BY THE PETITIONERS WAS CONDEMNED BY THIS COURT IN *Gulf Refining Co.* v. *Ins. Co.*, 279 U. S. 708. IN THAT DECISION THIS COURT REFLECTED ON THE SOUNDNESS OF CERTAIN DISTRICT COURT OPINIONS RELIED ON BY THE PETITIONERS.

The error of *The Armstrong* case, which has been so clearly pointed out in the decisions of this Court and the Circuit Court of Appeals for the Second Circuit, had a limited acceptance in early decisions. In fact, *The Armstrong* case was cited in dicta in two Supreme Court cases. *The Potomac,* 105 U. S. 630, 635; *Mobile & Montgomery R. Co.* v. *Jurey,* 111 U. S. 584, 594. The Circuit Court of Appeals for the Second Circuit, both in *The Livingstone* and this case, pointed out that the citation of *The Armstrong* decision was by way of dictum not importing any approval of the doctrine.

The case of *Mobile & Montgomery R. Co.* v. *Jurey,* 111 U. S. 584, on which petitioners apparently place great reliance, involved merely a question of who was the proper

party to sue a wrongdoer for a loss which had been compensated for by insurance. The so-called approval by this Court at page 594 of the dictum in *The Armstrong* case has not now the support of even the petitioners, because the petitioners concede that the dictum of *The Armstrong* case was erroneous and inequitable. The nature of the dictum in *The Potomac* has been discussed *supra,* page 40.

Except in peculiar cases of partial loss in hull insurance *The Armstrong* error has never been accepted. This Court refused to follow it in a cargo case in which the principle of *The Armstrong* case was directly asserted. *Gulf Refining Co.* v. *Ins. Co.,* 279 U. S. 708. As the Court below pointed out, the doctrine of *The Armstrong* case does not apply even in hull cases when the claim does not result from repairs, *Pitman* v. *Universal Ins. Co.,* [1882] L. R. 9 Q. B. D. 192; *S.S. Balmoral* v. *Marten,* [1902] App. Cas. 511; or as to the calculation of constructive total loss. *Bradlie* v. *The Maryland Insurance Co.,* 12 Pet. 378, 399; *Patapsco Ins. Co.* v. *Southgate,* 5 Pet. 604; *Irving* v. *Manning,* 6 C. B. 391, 136 E. R. 1302.

A decision holding that the agreed valuation does apply to subrogation is *The St. Johns,* (S. D. N. Y.) 101 Fed. 469. That was a partial loss case, which is distinguishable from a total loss case. That decision was grounded on the opinion of the Southern District of New York in *The St. Paul* (*International Navigation Co.* v. *Atlantic Mutual Ins. Co.*), 100 Fed. 304. It was concerning that case that this Court said:

> "We need not determine whether the rule as to hull insurance may be regarded as that of this Court or of others, or pass upon its merits."
>
> *Gulf Refining Co.* v. *Ins. Co.,* 279 U. S. 708, 713.

A. *The decision of The St. Paul is based solely on the reasoning of The Armstrong case and is entirely discredited.*

The St. Paul (*International Navigational Co.* v. *Atlantic Mutual Ins. Co.*), 100 Fed. 304, 317 affirmed without opinion (C. C. A. 2) 108 Fed. 987, cert. den. 181 U. S. 623, is hereinafter referred to as *The St. Paul.*

The St. Paul was valued in the policy at $1,350,000. Her actual value was $2,100,000. She was stranded on the New Jersey Coast near Long Branch with a resulting loss of $248,377.28.

The owner asked the underwriters to pay the entire loss. The underwriters pointed out that since the actual value of the vessel was largely in excess of the agreed valuation, the principle of co-insurance should apply, and that the owner and the underwriters should bear the partial loss in accordance with relative amounts at risk.

The court decided in favor of the owner and held that the underwriters had to pay the entire amount of the loss. The opinion is lengthy. The only substantial authority available to the Judge was *The Armstrong* opinion. A careful scrutiny of the reasoning of *The St. Paul* shows that no ground is advanced in support of the conclusion other than the grounds advanced in *The Armstrong* case. It is true that the court in *The St. Paul* did not go so far as *The Armstrong* case and actually recognized some of the errors of *The Armstrong* case. However, the essence of *The St. Paul* opinion was that the agreed valuation operated by estoppel. The court failed to appreciate the fact, now well settled, that the agreed valuation is only a stipulation for liquidated damages.

The Judge in the *St. Paul* case carefully confined his decision to partial loss cases, and indicated that as to total loss the rule would be different because in total loss cases, both of cargo and hull, the underwriters always pay the full amount of their policies. It was only because of a special practice in cases of partial loss to hull to repair the vessel that he differentiated the case from partial loss of cargo. That distinction does not apply in total loss of hull.

B. *The St. Johns was a logical outgrowth of the erroneous decision of The St. Paul.*

It will be observed that *The St. Paul* was not a case of subrogation and, therefore, is no authority in this case. Shortly after *The St. Paul,* however, a case of subrogation did come before the Southern District of New York. *The St. Johns,* 101 Fed. 469. In that case the agreed valuation was $20,000 and insurance policies were issued for that amount. The actual value was $60,000. There was a partial loss resulting from the collision amounting to $48,700. The owner filed a claim with the underwriters for the payment of the policy in full. The underwriters paid in full.

In subsequent litigation a decree was entered against the opposing vessel for the full damages amounting to $48,700. The owner of the opposing vessel, however, limited liability so that only $7,073.06 was recovered. The underwriters thereupon demanded the whole recovery. The owner contended that since the vessel was worth more than the agreed valuation, he was entitled to a share of the recovery.

In *The St. Johns* the owner in making a claim on the insurance policy asserted that the vessel was only worth the agreed valuation. The underwriters then paid the

owner on the basis of that assertion. The owner was not permitted after the recovery from the wrongdoer to change the asserted valuation.

The reasoning of *The St. Johns* is identical with the reasoning of *The St. Paul* and of *The Armstrong* case. As the Circuit Court of Appeals below said:

> "* * * Finally we are not convinced by the argument of Brown, J. in The St. Johns (D. C.) 101 F. 469, 473, that since in cases of full insurance the hull underwriter is wholly indemnified, the owner should not complain of the same result when he chooses to undervalue his ship and so to save premiums. That reasoning might indeed prevail in cases where the underwriter had been led to suppose that the agreed value was the full value, but that is never the case; at least it was not the case here. When it is not, there can be no inequity in letting in the owner as co-insurer, unless a contrary stipulation is to be implied in the policy; for the underlying understanding in any sort of insurance is that the insured is to be made whole at the insurer's expense; not that the insurer is to be preferred."

It appears that due to the inadvertent mistake of applying *The Armstrong* principle in a partial loss case, as was done in *The St. Paul,* there was some reason for the application of the doctrine to subrogation in a partial loss case, as in *The St. Johns.* It is not necessary, however, at this time to consider the validity of either *The St. Paul* or *The St. Johns,* or to deal at length with the rule in partial loss cases.

The courts have uniformly resisted the extension of the rule to any other type of case. This Court discountenanced the rule in cargo cases. *Gulf Refining Co.,* v. *Ins. Co., supra.*

The Circuit Court of Appeals for the Second Circuit has refused to apply the rule in total loss cases, and in many other types of cases, both in this country and in England, the rule has been discredited.

Since the agreed valuation has no practical effect in a total loss case, and since there is no legal justification for applying it to subrogation in any event, the doctrine advocated by the petitioners should be again condemned by this Court.

The rule that underwriters and owners under a valued policy are not co-insurers with respect to partial losses has been based on the fact that, in the case of partial loss to ships, the usual practice is for the assured to make repairs. His repair bill represents a sum of money which is the amount of his damage, ascertained without regard to the ship's value, and so the rule has been adopted as more convenient in practice than one requiring the determination of the sound value of the ship every time there is a partial damage. *Gulf Refining Co.* v. *Ins. Co.*, 279 U. S. 708, 713. In other words, partial losses of a ship are the same, whatever her value. The loss is determined not by her real or agreed value, but by the cost of the repairs. Hence it is clear that partial loss cases cannot be of any determinative assistance in the present controversy.

The decision of Judge Brown in *The St. Paul* and the decision of the Circuit Court of Appeals in *Gulf Refining Co.* v. *Ins. Co.*, 27 F. (2d) 678 and the decision of this Court in *Gulf Refining Co.* v. *Ins. Co.*, 279 U. S. 708, carefully point out that the reason for the rule in case of partial loss of hull is based solely on the custom adopted by underwriters and owners of measuring damages by repair bills. It is a rule of convenience.

The Courts in those decisions carefully limit the rule to cases of partial loss of hull, because of the exceptional circumstance that in such cases the repair bill is taken as the measure of loss.

The agreed valuation has the same effect in case of total loss of hull or cargo. In either case the assurers pay the amount of their policies and the owners bear any loss in addition to the agreed valuation, or the amount of the policies, as co-insurers. The rule in hull partial loss cases, therefore, is based on narrow peculiar circumstances, which have no application to a case of total loss. Every argument advanced by the petitioners was advanced in *Gulf Refining Co.* v. *Ins. Co.*, 279 U. S. 708, and all were refuted by this Court. It is submitted that that decision is authoritative on the question here presented and that the decision below should be affirmed.

LAST POINT.

PETITIONERS' ASSERTIONS OF CONFLICT WITH ENGLISH LAW AND ESTABLISHED UNDERWRITING PRACTICES ARE BASELESS.

Petitioners assert that our law should conform with English law. Since there is no English case involving facts similar to this case, or *The Livingstone*, it is impossible to know what an English Court would hold in a case of total loss, where recovery from wrongdoer exceeds the agreed valuation. We submit that the dictum of *The Armstrong* case, relied on by petitioners, would not be followed by English Courts. That dictum has been so discredited in English decisions that it cannot be held to reflect prevailing English law.

Petitioners attempt to describe an underwriting practice or custom which in some way adds color to their claim. Analysis of this attempted creation of an "underwriting practice" shows that it is but an assertion of discredited legal principles condemned by the Court below.

The basic argument is that in partial loss cases, the hull underwriter pays the whole repair bill under *The St. Paul.* The petitioners, at page 43 of their brief, almost question that decision, just as this Court did in *Gulf Refining Co.* v. *Ins. Co., supra.* But whether *The St. Paul* is sound or not is irrelevant here, because it was based on the exceptional fact that in partial loss cases underwriters and owners measured the loss by repair bills as a matter of mutual convenience. It was an exception to all rules of insurance. In case of total loss, either of cargo or hull, no such exceptional rule exists. Underwriters pay for the total loss in the normal course. Subrogation, therefore, operates in its normal way to give the assured indemnity first, and to prevent his getting more than indemnity. This is the legal underwriting practice. Petitioners describe the reverse as "conventional".

Associated with that discussion of the partial loss rule, as evidence of custom, is a long essay on the subject of P. P. I. insurance. It is asserted that shipowners take out P. P. I. insurance in which P. P. I. underwriters waive subrogation, so that the assured will not be underindemnified if basic hull underwriters are first indemnified out of any recovery.

The only possible basis for the assertion of such alleged custom in the record is the following statement in the answer (R. 16):

> "In addition to the policies of insurance referred to in Paragraph 3 of the complaint, the defendant also, in accordance with the customary practice, procured other policies of insurance upon the *S. S. Almirante* for increased valuation in the sum of £65,105,[1] which additional insurance covered only against total and/or constructive total loss and was permitted by the terms of the hull policies."

The evidence of custom relied on by petitioners is entirely contrary to the practice they describe, because increased value hull insurance shares in subrogation with agreed value hull underwriters! This Court has but recently noted the rule. *Standard Marine Ins. Co., Ltd.* v. *Assur. Co., Ltd.*, 283 U. S. 284, 290, discussing *Brown* v. *Merchants' Marine Ins. Co.*, (C. C. A. 9) 152 Fed. 411. The statement refers only to "increased value" insurance such as was involved in the *Brown* case.

If the United Fruit Company had the right, as it expressly did under the terms of the policies, to take out additional insurance above the agreed valuation, which insurance would have shared with the original agreed value hull underwriters in any recovery from a wrongdoer, then clearly any person who assumed the risk above the agreed valuation was a co-insurer above that valuation with the hull underwriters.

Petitioners truly assert, and their original forms of policy illustrate, that ordinarily underwriters are concerned with the character of their assured's additional insurance above the agreed value, because of the possibility of negligence or fraud on the part of an owner who might

---

[1] As we noted, *supra*, page 7, part of this insurance was on interests other than hull.

profit from the loss. But petitioners here, possibly out of the high regard they expressed in the trial court for respondent, and its adjusters, were not so concerned about respondent. They expressly promised to pay the repair bill, up to the amount of their policies, in case of partial loss, and expressly gave respondent complete liberty to protect itself in case of total loss by any obtainable insurance or to carry the risk itself (*supra*, pp. 12, 13). Under the *Brown* case, *supra*, such additional insurance shared in subrogation equally with the other hull underwriters notwithstanding the agreed value clause.

Respondent was given absolute liberty as to insurance of increased valuation. It was not limited to any form of insurance. Assured is described by petitioners as one of the oldest and largest American shipowners. It could well have been a self-insurer as to the balance of its interest in the *Almirante*.

Respondent might have taken out "increased valuation" insurance as in the *Brown* case for the full amount of its interest in the *Almirante*, in which case petitioners would have had to share the recovery from the United States, just as they do now.

Respondent might have taken out American total loss "P. P. I." insurance. Since respondent had a real insurable interest, such insurance would have been perfectly legal in this Country. Mr. Justice Story, *Alsop* v. *Commercial Ins. Co.*, Fed. Cas. No. 262. Respondent could have collected on such insurance and P. P. I. underwriters could have shared in subrogation with petitioners. *Frank B. Hall & Co.* v. *Jefferson Ins. Co.*, (S. D. N. Y.) 279 Fed. 892.

It is conceded that respondent could have insured its additional interest, P. P. I. in England, underwriters waiv-

ing salvage as they did. Petitioners did not care what respondent did; they relied on respondent's reputation as a protection against the only fear underwriters have, fraud or negligent operation—a not misplaced confidence in this case.

Petitioners contracted to permit respondent to protect its additional interest in the *Almirante* in any of the above ways—there may be more. Petitioners now attempt to amend their contract to read that respondent agreed to indemnify petitioners first and bear any resulting deficiency —because petitioners had waived the usual protective measures against fraud or negligent operation.

Avoidance of underwriting contracts, decisions demonstrate, is often attempted by assertion of "customs" or "practices." Petitioners' allegation of custom in this case is not only lacking in support even by a single witness, but is refuted as a matter of fact by decisions.

RESPONDENT HAS NEVER BEEN INDEMNIFIED FOR THE LOSS OF THE *S. S. Almirante*. THERE IS, THEREFORE, NO REASON FOR ADDITIONAL SUBROGATION. THE DECISION OF THE CIRCUIT COURT OF APPEALS SHOULD BE AFFIRMED.

Respectfully submitted,

CLETUS KEATING,
RICHARD SULLIVAN,
Counsel for Respondent.

New York, N. Y.
April 18, 1938.

p. 6,

SUPREME COURT OF THE UNITED STATES.

Nos. 773, 774, 775.—October Term, 1937.

Aetna Insurance Company, Petitioner,
773 *vs.*
United Fruit Company.

Union Marine & General Insurance Company, Ltd., formerly Union Marine Insurance Company, Ltd., Petitioner,
774 *vs.*
United Fruit Company.

Boston Insurance Company, Petitioner,
775 *vs.*
United Fruit Company.

On Writs of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[May 23, 1938.]

Mr. Justice Stone delivered the opinion of the Court.

The question for decision is how far hull insurers upon a valued marine insurance policy are entitled, in case of total loss, to participate by way of subrogation in a recovery by the insured against a tortfeasor responsible for the loss.

In 1918 petitioners, with several other underwriters, insured the hull of respondent's vessel, the "Almirante", by policies in which it was agreed that the value of the hull was $632,610, materially less than its true value. The policies provided for a stipulated indemnity to the owner "irrespective of the value of the vessel", and that the owner was free to effect other insurance to any amount and without disclosure of the amounts so insured. As the total of the valued policies was $582,002.25, respondent was co-insurer for about $50,000; and so far as the valued hull policies were concerned it was uninsured, to the extent of any loss, in excess of the stipulated value. As protection against these risks, respondent procured from English underwriters additional P. P. I. (policy

proof of interest) insurance, aggregating £65,105, partly upon hull and partly against other losses incidental to total loss of the vessel. The P. P. I. policies waived all rights of subrogation and were "honor" policies, concededly payable only at the option of the insurers because unenforceable under the Act of Parliament of December 31, 1906, § 4. *Edwards & Co.* v. *Motor Union Insurance Co.*, [1922] 2 K. B. D. 249.

In 1918 the "Almirante" became a total loss as the result of a collision with the S. S. "Hisko", a vessel belonging to the United States Government. The underwriters of both the valued policies and the P. P. I. policies paid them in full. The former joined with respondent in retaining attorneys to press the claims for collision damages against the United States. Suit brought against the United States under a special act of Congress, resulted in a recovery which included $1,750,000 as the value of the vessel, but without interest since the act did not authorize allowance of interest. Compare *Boston Sand and Gravel Co.* v. *United States*, 278 U. S. 41, 47. Distribution of the proceeds of the suit was made in accordance with a computation by insurance adjusters who apportioned the expenses of the suit among respondent and the underwriters, and allotted to the latter the amounts they had paid on their policies without interest, less their respective shares of the expenses.

Petitioners, who are underwriters on some of the valued hull policies, brought the present suit in the district court for southern New York to participate in respondent's recovery against the United States. Relying on the valuation clause of their policies as conclusively fixing the value of the vessel for all purposes of the adjustment, they contest the allotment, insisting that they should bear no part of the expenses, and that they are entitled to interest on the amounts of their policies from the several dates on which they were paid. They also make, but do not stress here, the point that the hull insurers are entitled to the whole recovery. The district court gave judgment for the full amount which petitioners had paid on their policies without deduction for expenses, but without addition of interest. 18 Fed. Supp. 441. On appeal by both parties, the Court of Appeals held that petitioners were entitled to neither interest nor expenses, and modified the judgment accordingly. 92 F. (2d) 576. We granted certiorari, — U. S. —, be-

cause of the admitted conflict of the decision below with that of the Court of Queen's Bench in *North of England, etc., Insurance Ass'n.* v. *Armstrong* (1870) L. R. 5 Q. B. 244. See *Queen Insurance Co.* v. *Globe & Rutgers Fire Insurance Co.*, 263 U. S. 487, 493; *Gulf Refining Co.* v. *Atlantic Mutual Insurance Co.*, 279 U. S. 708, 715.

Petitioners' argument turns upon their contention that the valuation clause, either by estoppel or by contract, is conclusive between the parties for all purposes and that as respondent has recovered from the Government more than the stipulated value of the vessel, petitioners are entitled to the benefit of the recovery, at least to the full extent of the payments on their policies with interest. We think that the valuation clause in its usual form does not operate as an estoppel or by agreement to foreclose proof that actual value exceeds agreed value when the question is of the insurer's right to subrogation. The application of the agreed value to the insurance adjustment does not depend upon estoppel, *Gulf Refining Co.* v. *Atlantic Mutual Insurance Co., supra*, 712; *British & Foreign Marine Insurance Co.* v. *Maldonado & Co.*, 182 Fed. 744, and there can be no basis for an estoppel at least where, as here, the policy provisions undertake to indemnify the insured irrespective of the value of the vessel and contemplate that the insured may effect other insurance. The valuation stipulation fixes in advance of loss the value of the vessel, so as to avoid the necessity of proof of value in order to establish the extent of the liability assumed on the policy. The agreed value, honestly arrived at, thus stands in the place of prime value under an open marine policy, *Gulf Refining Co.* v. *Atlantic Mutual Insurance Co., supra*, 711; *St. Paul Fire & Marine Insurance Co.* v. *Pure Oil Co.*, 63 F. (2d) 771, and resembles, in its practical operation, a stipulation for liquidated damages.

But beyond its controlling effect in determining the insurance liability, the clause does not operate to exclude proof of actual value when relevant. Even in an action on the policy the actual rather than the agreed value has been held to be controlling for the purpose of determining whether there is a constructive total loss. *Bradlie* v. *Maryland Insurance Co.*, 12 Pet. 378, 399; *Irving* v. *Manning*, 6 C. B. 391 (H. of L.). In the case of partial insurance of cargo under a valued policy the insured is treated as a co-insurer and is allowed to recover on the policy only such propor-

tion of the loss as the insured value bears to the actual value, a computation which necessarily requires proof of the actual value in order to establish the co-insurance relationship. *Gulf Refining Co.* v. *Atlantic Mutual Insurance Co., supra,* 710-711; see *International Navigation Co.* v. *Atlantic Mutual Insurance Co.,* 100 Fed. 304, 318, aff'd. per curiam 108 Fed. 987; Arnould on Marine Insurance, 11th Edition, § 340; Eldridge on Marine Policies, 2nd Edition, p. 90. It is true, as was pointed out in *Gulf Refining Co.* v. *Atlantic Mutual Insurance Co., supra,* that in case of valued hull policies losses resulting in repairs are customarily paid in full, not because of agreement or estoppel but because partial losses to hull usually result in repairs without any valuation of the hull and the rule that the recovery shall be measured by repairs has been found more convenient in practice than one requiring determination of the sound value of the ship. See *Lohre* v. *Aitchison,* L. R. 2 Q. B. D. 501, 507. The same rule as in the case of cargo insurance has been applied when repairs were not made, and value was established by the sale of the vessel, *Pitman* v. *Universal Marine Insurance Co.,* L. R. 9 Q. B. D. 192, and in the case of general average contribution by the hull. *S. S. "Balmoral" Co.* v. *Marten,* [1902] App. Cas. 511, 514, 515. The peculiar rule of the insurer's liability for partial loss to hull when repairs are made does not depend on the valuation clause and affords no basis for treating it as excluding the insured as co-insurer when there is a total loss.

These variations in the effect of the valuation clause, in fixing the liability of the insurer, do not alter the character of the valued policy as a contract of indemnity, or afford any basis for alteration of his rights as an indemnitor. Whether upon a valued or an open policy, he is entitled to share in the insured's recovery of damages only by way of subrogation, whose sole object and justification is to make indemnity to the insured up to the amount of the policy, the measure of the liability of the insurer. *Standard Marine Insurance Co.* v. *Scottish Metropolitan Assurance Co.,* 283 U. S. 284, 288; *Aetna Casualty & Surety Co.* v. *Phoenix National Bank & Trust Co.,* 285 U. S. 209, 214; *Chapman* v. *Hoage,* 296 U. S. 526, 531. The doctrine now contended for, would require a radical departure from the principle on which subrogation is founded. Consistently applied, it would in some cases deprive the insured of indemnity, and indeed might enable the insurer to make a profit by recovering more from the insured than the

amounts paid on the policy. We are unable to sanction a doctrine involving such consequences.

No question is raised by the petition for certiorari or appears to have been raised below as to the correctness of the adjustment statement, if the valuation clause does not foreclose proof of actual value and if respondent is therefore to be regarded as a co-insurer of the hull in event of total loss. Petitioners make no contention that respondent, if so regarded, has received more than appropriate indemnity after the distribution of the proceeds of the collision suit. The total insurance received by respondent from the insurers in 1918 and 1919, aggregating $886,068, was approximately $863,932 less than the prime value of the vessel which some thirteen years later it recovered in the collision suit, without allowance of interest and after the expenditure of more than $300,000 as costs of the litigation. Petitioners submit no interest computations and have otherwise made no effort to sustain the burden of proving that respondent has received more than indemnity for the delay in payment of as much of the loss as was not covered by insurance.

Since the expenses have been apportioned by charging the insured with a proportion greater than its share of the risk, and the apportionment is not assailed except as it may be wholly precluded by the valuation clause, it is unnecessary to consider whether the distribution of expense should be upon principles of co-insurance or whether the insured should be fully indemnified for it before the insurer is entitled to subrogation.

Petitioners point to no practice of underwriters with respect to the valued policy or its rate of premium as compared with that for the open policy, which supports the rule for which they contend. But they insist that it has been adopted in England and has become so well settled in New York where the insurance was effected, that it must be taken to be an implied term of the policies. It is true that *North of England, etc., Insurance Ass'n.* v. *Armstrong, supra,* lends support to petitioners' argument. There, upon a total loss, the insured had recovered as collision damages an amount less than the agreed valuation and it was held that the insurer, who had paid the policy in full, was entitled to have the benefit of the entire recovery. The court thought that the case was analogous to that of abandonment in case of a constructive total loss where the underwriter, by

virtue of the abandonment, is entitled to the wreck and to such profit from it as he can make. Pursuing the logic of its reasoning, the court declared that the insurer would have been entitled to the insured's full recovery even if it exceeded the agreed value. But it seems plain that there is no analogy between the insurer's right to be subrogated to the fruits of the insured's recovery from a wrongdoer and the insurer's right to a wreck which is his by abandonment. *The Potomac,* 105 U. S. 630, 634; *The St. Johns,* 101 Fed. 469, 472 (S. D. N. Y.); Arnould on Marine Insurance, 11th Edition, §§ 1228-1230.

North of England, etc., Insurance Ass'n. v. *Armstrong, supra,* was cited in *The Potomac, supra,* 635, and in *Mobile & Montgomery R. Co.* v. *Jurey,* 111 U. S. 584, 594, 595, neither of which involved the question now presented. It was followed in *The St. Johns,* but not to the extent of allowing a profit to the insurer. In *The Livingstone,* 130 Fed. 746 (C. C. A. 2), the claim of a valued hull insurer to the whole collision recovery, which exceeded the agreed value, was denied upon reasoning which rejected that of *North of England, etc., Insurance Ass'n.* v. *Armstrong, supra,* and *The St. Johns, supra,* and calls for affirmance of the judgment here. Interest was allowed to the insurer, apparently because interest on the full value of the vessel had been recovered in the damage suit. Without discussing the point the court by its mandate directed payment to the underwriters of the full amount of their policies without deduction for expenses. But as it considered that the ~~insured's~~ insurer's right of recovery rested upon subrogation unaffected by the valuation clause, we cannot regard the case as an intentional departure from the rule that the insurer is entitled to subrogation only after the insured is appropriately indemnified or as establishing any rule that the valuation clause forecloses proof of actual value as a step in measuring the insurer's recovery by way of subrogation.

We recognize that established doctrines of English maritime law are to be accorded respect here, *Queen Insurance Co.* v. *Globe & Rutgers Fire Insurance Co., supra,* 493; *Gulf Refining Co.* v. *Atlantic Mutual Insurance Co., supra,* 715, but the pronouncement in *North of England Insurance, etc., Ass'n.* v. *Armstrong, supra,* has never been adopted by an English appellate court. It was doubted by eminent judges in *Burnand* v. *Rodocanachi,* [1882] L. R. 7 App. Cas.

333, 342, and in *Thames & Mersey Marine Ins. Co.* v. *British & Chilean S. S. Co.*, L. R. 2 K. B. 214, 221. Its reasoning, conflicting as it does with established principles of maritime insurance law, and found to be incapable of consistent application both in *The St. Johns*, *supra*, 474-475, and in *The Livingstone*, *supra*, 750, should be rejected here.

Affirmed.

Mr. Justice CARDOZO took no part in the consideration or decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.